

No. 16092 ✓

United States
Court of Appeals
for the Ninth Circuit

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS, Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax
Court of the United States

FILED
OCT - 1 1958
PAUL P. O'BRIEN, CLERK

No. 16092

United States
Court of Appeals
for the Ninth Circuit

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax
Court of the United States



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to Petition for Redetermination of Deficiency	17
Certificate of Clerk to Transcript of Record...	43
Decision	39
Designation of Record To Be Printed (USCA)	69
Findings of Fact and Opinion.....	23
Names and Addresses of Attorneys.....	1
Petition for Redetermination of Deficiency....	3
Exhibit A—Notice of Deficiency.....	7
Petition for Review of Decision.....	40
Statement of Points Relied Upon by Appel- lants (USCA)	66
Stipulation of Facts.....	19
Stipulation With Respect to Printing Exhibits (USCA)	68

ii.

Transcript of Proceedings and Testimony.....	44
--	----

Witnesses:

Cook, Churchill

—direct	57
—cross	60

Voloudakis, Steven

—direct	45
—cross	50
—By the Court.....	62

NAMES AND ADDRESSES OF ATTORNEYS

McDANNEL BROWN,
805 Equitable Building,
Portland 4, Oregon,
Attorney for Petitioners.

CHARLES K. RICE,
Assistant U. S. Attorney General,

LEE A. JACKSON,
Attorney,
Department of Justice,
Washington 25, D. C.,
Attorneys for Respondent.



The Tax Court of the United States

No. 62444

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (A:R: 90D:ENH:lk) dated February 21, 1956, and as a basis for their proceedings allege as follows:

1. The petitioners are individuals, husband and wife, residing at 1711 N. Skidmore Street, Portland, Oregon. The returns for the periods here involved were filed with the Collector or District Director for the District of Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on February 21, 1956.

3. The deficiencies as determined by the Commissioner are in income taxes and penalties for the below-indicated calendar years in the below-specified amounts:

Year	Deficiency	Sec. 291(a) Penalty	Sec. 294(d) (1) Penalty	Sec. 294(d) (2) Penalty
1949	\$ 1,868.66	\$ 467.16	\$ 4.00	\$ 145.95
1950	3,241.66	—0—	387.47	258.31
1951	3,635.80	—0—	52.50	261.78
1952	4,093.68	1,023.44	75.00	254.63
1953	5,899.84	—0—	97.50	397.64
	<hr/>	<hr/>	<hr/>	<hr/>
Totals	\$18,739.64	\$1,490.60	\$616.47	\$1,318.31

Substantially all of the above deficiencies and penalties are in dispute.

4. The determination of taxes and penalties set forth in the said notice of deficiency is based upon the following errors:

(a) The capital gain reported by petitioners through the partnership, Stevens Cleaners & Hatters, for the subject years was capital gain as reported by petitioners and was not ordinary income as asserted by the Commissioner.

(b) For the calendar year 1953, the \$3,900.00 received from the corporation, Stevens Cleaners, Inc., was not received as wages but was paid as repayment of a loss or debt.

(c) The penalties are in error to the extent that the amount thereof is dependent upon the deficiencies erroneously asserted by the Commissioner. Also all of the penalties should not be asserted for any one year.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) The amounts reported by the petitioners as

capital gain (erroneously asserted to be ordinary income by the Commissioner) were received under and pursuant to an agreement dated April 8, 1947 by and between Sweeney Investment Company, petitioners, and the Pacific Telephone and Telegraph Company. Sweeney Investment Company (referred to in the agreement as Sweeney) was the owner of certain premises leased to petitioners under a lease agreement dated March 5, 1946. In the agreement of April 8, 1947, petitioners are referred to as the lessors and under said agreement they grant to the Pacific Telephone and Telegraph Company, as lessee, all rights petitioners had in the premises.

(b) By granting under said agreement of April 8, 1947 all rights they had in the premises, being their leasehold interest under the March 5, 1946 lease, petitioners in effect assigned all of their right, title and interest in the March 5, 1946 lease. Such lease was a capital asset and was held by petitioners for more than six months. The amounts received by petitioners under the April 8, 1947 agreement were received in consideration for such sale or assignment of a capital asset (the March 5, 1946 lease), so such amounts are entitled to be reported by petitioners as long term capital gain. It is immaterial that petitioners were referred to in the April 8, 1947 agreement as lessors, and the fact that other portions of the agreement are expressed in terms of a lease. The realities of the situation control. Under the agreement petitioners gave up all of the rights

in their leasehold. Such surrender of rights constituted a sale or assignment for tax purposes.

(c) The \$3,900.00 received by petitioner, Steven Voloudakis, for the calendar year 1953, was erroneously reported on the books of the corporation as compensation. At the time of such payments, the corporation was indebted to Steven Voloudakis in amounts in excess of \$3,900.00. The payments comprising the \$3,900.00 should have been applied against reduction of such loans and should not have been treated as compensation to Steven Voloudakis.

(d) Since the contention of petitioners set forth in subparagraph (c) of Paragraph 4 above are dependent upon questions of law, no statement of facts is required in regard thereto.

Wherefore, the petitioners pray that this Court may hear the proceeding and determine that there is no deficiency in income tax or penalties for the calendar years 1949, 1950, 1951, 1952 or 1953, and give such other and further relief as in the premises the Court may deem fit and proper.

/s/ WILLIAM H. KINSEY.

Duly Verified.

EXHIBIT "A"

Letterhead of
U. S. Treasury Department
Internal Revenue Service
District Director
830 N. E. Holladay Street
Portland 14, Oregon

February 21, 1956

In replying refer to:

A:R: 90D:ENH:lk

Mr. Steven Voloudakis and
Mrs. Katherine Voloudakis
Husband and Wife
1711 N. Skidmore Street
Portland, Oregon

Dear Mr. and Mrs. Voloudakis:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1949, December 31, 1950, December 31, 1951, December 31, 1952 and December 31, 1953, disclosed deficiencies in tax aggregating \$18,739.64, and penalties aggregating \$3,425.38, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days, you may not

Exhibit "A"—(Continued)

exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to District Director of Internal Revenue, Chief, Audit Division, 830 N.E. Holladay Street, Portland 14, Oregon. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Yours very truly,

RUSSELL C. HARRINGTON,

Commissioner,

/s/ By R. C. GRANQUIST,

District Director.

Enclosures: Statement, Form 160, Agreement Form.
1230-A.

A:R:90D:ENH:lk

STATEMENT

Mr. Steven Voloudakis and Mrs. Katherine Voloudakis, Husband
and Wife, 1711 N. Skidmore Street, Portland, Oregon.

Income tax liability for the taxable years ended December 31,
1949, December 31, 1950, December 31, 1951, December 31, 1952
and December 31, 1953.

Exhibit "A"—(Continued)

Year	Deficiency	Sec. 291(a) Penalty	Sec. 294(d) (1) Penalty	Sec. 294(d) (2) Penalty
1949	\$ 1,868.66	\$ 467.16	\$ 4.00	\$ 145.95
1950	3,241.66	—0—	387.47	258.31
1951	3,635.80	—0—	52.50	261.78
1952	4,093.68	1,023.44	75.00	254.63
1953	5,899.84	—0—	97.50	397.64
Totals	\$18,739.64	\$1,490.60	\$616.47	\$1,318.31

In making this determination of your income tax liability, careful consideration has been given to the report of examination attached to the letter dated January 6, 1956.

Inasmuch as your returns for the years 1949 and 1952 were not filed within the time prescribed by law, the twenty-five per cent of the tax has been added thereto in the respective amounts of \$467.16 and \$1,023.44 in accordance with the provisions of section 291(a) of the Internal Revenue Code.

Inasmuch as you failed to make and file a declaration of estimated tax for the year 1950 and the failure to pay the installments due on the declaration of estimated tax filed for the years 1949, 1951, 1952 and 1953 within the time prescribed by law, the five, six and ten per cent penalties have been asserted in accordance with the provisions of section 294(d)(1) of the Internal Revenue Code.

The six per cent penalty for the substantial underestimation of estimated tax has been asserted in accordance with the provisions of section 294(d)(2) of the Internal Revenue Code.

Taxable year ended December 31, 1949

Adjustments to Income

Net income as disclosed by return	\$ 6,097.72
Unallowable deductions and additional income:	
(a) Partnership income	17,505.54
Total	\$23,603.26
Nontaxable income and additional deductions:	
(b) Capital gain	\$8,392.60
(c) Standard deduction	322.47 8,715.07
Net income as adjusted	\$14,888.19

Exhibit "A"—(Continued)

Explanation of Adjustments

(a) It has been determined that your share of the ordinary income from Stevens Cleaners & Hatters for 1949 is \$15,888.19
Your return reported a loss from the partnership of .. 1,617.35

Your taxable income is increased in the sum of \$17,505.54

(b) It has been determined that you had no capital gain through the partnership of Stevens Cleaners & Hatters for 1949 and since your return reported a capital gain of \$8,392.60 from this source your taxable income is reduced in such amount.

(c) You are entitled to a standard deduction of \$1,000.00 in accordance with the provisions of section 23(aa) of the Internal Revenue Code and since your return reported a standard deduction of \$677.53 you are entitled to the difference of \$322.47 and your taxable income is reduced accordingly.

Computation of Tax

Net income as adjusted \$14,888.19
Less: Exemption—4 x \$600.00 2,400.00

Income subject to tax \$12,488.19
Income tax liability \$2,482.48
Income tax liability disclosed by return 613.82

Deficiency of income tax \$1,868.66

Penalty Computation

Penalty under sec. 291(a) 25% of \$1,868.66 467.16
Penalty for failure to pay your installments on your estimated tax of \$100.00 is computed as follows:

Amount	Due Date			
due	Installment	Date Paid	Rate	Penalty
\$ 25.00	3/15/49	3/ 4/49	—0—	\$—0—
25.00	6/15/49	6/ 2/49	—0—	—0—
25.00	9/15/49	3/15/54	10%	2.50
25.00	1/15/50	3/15/50	6%	1.50
<hr/>				
\$100.00	Total penalty under sec. 294(d) (1) (B)			\$ 4.00

Exhibit "A"—(Continued)

Total tax liability as above	\$2,482.48	
Less actually paid on estimated tax	50.00	
		<hr/>
Balance	\$2,432.48	
Penalty under sec. 294(d)(2) I.R.C.		
6% of \$2,432.48		\$145.95

Taxable year ended December 31, 1950

Adjustments to Income

Net income as disclosed by return	\$ 8,235.46	
Unallowable deductions and additional income:		
(a) Partnership income	23,505.54	
		<hr/>
Total	\$31,741.00	
Nontaxable income and additional deductions:		
(b) Capital gain	\$10,767.86	
(c) Standard deduction	84.95	10,852.81
		<hr/>
Net income as adjusted	\$20,888.19	

Explanation of Adjustments

(a) It has been determined that your share of the ordinary income from Stevens Cleaners & Hatters for 1950 is	\$21,888.19
Your return reported a loss from the partnership of....	1,617.35
	<hr/>
Your taxable income is increased in the sum of	\$23,505.54

(b) It has been determined that you had no capital gain through the partnership of Stevens Cleaners & Hatters for 1950 and since your return reported a capital gain of \$10,767.86 from this source your taxable income is reduced in such amount.

(c) You are entitled to a standard deduction of \$1,000.00 in accordance with the provisions of section 23(aa) of the Internal Revenue Code and since your return reported a standard deduction of \$915.05 your reported income is reduced by the difference of \$84.95.

Computation of Tax

Net income as adjusted	\$20,888.19
Less: Exemption—4 x \$600.00	2,400.00
	<hr/>
Income subject to tax	\$18,488.19

Exhibit "A"—(Continued)

Income tax liability	\$4,305.12
Income tax liability disclosed by return	1,063.46
	<hr/>
Deficiency of income tax	\$3,241.66

Penalty Computation

Penalty for failure to file a Declaration of Estimated tax under section 291(d)(1)(A) computed as follows:

Amount	Installment			
due	Due Date	Date Paid	Rate	Penalty
\$1,076.28	3/15/50	3/15/51	10%	\$107.63
1,076.28	6/15/50	3/15/51	10%	107.63
1,076.28	9/15/50	3/15/51	10%	107.63
1,076.28	1/15/51	3/15/51	6%	64.58
<hr/>				
\$4,305.12	Total penalty under sec. 294(d)(1)(A)			\$387.47
Penalty under sec. 294(d)(2) I.R.C.				
6% of \$4,305.12				\$258.31

Taxable year ended December 31, 1951

Adjustments to Income

Net income as disclosed by return	\$ 8,235.47
Unallowable deductions and additional income:	
(a) Partnership income	23,505.54
	<hr/>
Total	\$31,741.01
Nontaxable income and additional deductions:	
(b) Capital gain	\$10,767.77
(c) Standard deduction	84.95 10,852.82
	<hr/>
Net income as adjusted	\$20,888.19

Explanation of Adjustments

(a) It has been determined that your share of the ordinary income from Stevens Cleaners & Hatters for 1951 is	\$21,888.19
Your return reported a loss from the partnership of	1,617.35
	<hr/>
Your taxable income is increased in the sum of	\$23,505.54

(b) It has been determined that you had no capital gain through the partnership of Stevens Cleaners & Hatters for 1951

Exhibit "A"—(Continued)

and since your return reported a capital gain of \$10,767.87 from this source your taxable income is reduced in such amount.

(c) You are entitled to a standard deduction of \$1,000.00 in accordance with the provisions of section 23(aa) of the Internal Revenue Code and since your return reported a standard deduction of \$915.05 your reported income is reduced by the difference of \$84.95.

Computation of Tax

Net income as adjusted	\$20,888.19
Less: Exemption—4 x \$600.00	2,400.00
<hr/>	
Income subject to tax	\$18,488.19
Income tax liability	\$4,862.94
Income tax liability disclosed by return	1,227.14
<hr/>	
Deficiency of income tax	\$3,635.80

Penalty Computation

Penalty for failure to pay installments on your estimated tax of \$1,000.00 is computed as follows:

Amount due	Installment Due Date	Date Paid	Rate	Penalty
\$ 250.00	3/15/51	3/15/51	—0—	\$—0—
250.00	6/15/51	6/18/51	5%	12.50
250.00	9/15/51	3/15/52	10%	25.00
250.00	1/15/52	3/15/52	6%	15.00
<hr/>				
\$1,000.00	Total penalty under sec. 294 (d) (1) (B)			\$ 52.50
Total tax liability as above				\$4,862.94
Less Actually paid on estimate				500.00
Balance				<hr/> \$4,362.94
Penalty under sec. 294(d) (2) I.R.C.				
6% of \$4,362.94				\$261.78

Taxable year ended December 31, 1952

Adjustments to Income

Net income as disclosed by return	\$ 8,278.33
Unallowable deductions and additional income:	
(a) Partnership income	23,505.54
(b) Rents	231.95
<hr/>	
Total	\$32,015.82

Exhibit "A"—(Continued)

Nontaxable income and additional deductions:

(c) Capital gain	\$10,767.87	
(d) Standard deduction	80.19	10,848.06
		<hr/>
Net income as adjusted		\$21,167.76

Explanation of Adjustments

(a) It has been determined that your share of the ordinary income from Stevens Cleaners & Hatters for 1952 is	\$21,888.19
Your return reported a loss from the partnership of	1,617.35
	<hr/>
Your taxable income is increased in the sum of	\$23,505.54

(b) It has been determined that depreciation on rental property does not exceed \$184.72 for period 6/1/52 to 12/31/52, based on a thirty year life and a cost of building of \$9,500.00. Since you claimed a deduction of \$416.67, the reported net income is increased by the difference of \$231.95, in the amounts shown.

(c) It has been determined that you had no capital gain through the partnership of Stevens Cleaners & Hatters for 1952 and since your return reported a capital gain of \$10,767.87 from this source, your taxable income is reduced in such amount.

(d) You are entitled to a standard deduction of \$1,000.00 in accordance with section 23(aa) of the Internal Revenue Code and since your return reported a deduction of \$919.81 your taxable income is reduced \$80.19 as above.

Computation of Tax

Net income as adjusted	\$21,167.76
Less: Exemption—4 x \$600.00	2,400.00
	<hr/>
Income subject to tax	\$18,767.76
Income tax liability	\$5,443.74
Income tax liability disclosed by return	1,350.06
	<hr/>
Deficiency of income tax	\$4,093.68

Exhibit "A"—(Continued)

Penalty Computation

Penalty under sec 291(a) I.R.C.

25% of \$4,093.68 \$1,023.44

Total tax liability as above \$5,443.74

Less paid on estimated tax 1,200.00

Balance \$4,243.74

Penalty under sec. 294(d) (2) I.R.C.

6% of \$4,243.74 \$ 254.63

Penalty for failure to pay installments on your
estimated tax of \$1,200.00 is computed as
follows:

Amount Installment

due	Due Date	Date Paid	Rate	Penalty
\$ 300.00	3/15/53	3/17/52	5%	\$15.00
300.00	6/15/52	7/10/52	5%	15.00
300.00	9/15/52	1/19/53	10%	30.00
300.00	1/15/53	1/19/53	5%	15.00

\$1,200.00	Total penalty under sec. 294(d) (1) (B)	\$75.00
------------	---	---------

Taxable year ended December 31, 1953

Adjustments to Income

Net income as disclosed by return \$ 8,283.28

Unallowable deductions and additional income:

(a) Wages 3,900.00

(b) Rents 799.94

(c) Partnership income 23,505.78

Total \$36,489.00

Nontaxable income and additional deductions:

(d) Capital gain \$10,821.00

(e) Standard deduction 79.63 10,900.63

Net income as adjusted \$25,588.37

Explanation of Adjustments

(a) It has been determined that you received wages in the amount of \$3,900.00 from the corporation, Stevens Cleaners, Inc. during the taxable year which was not reported in your

Exhibit "A"—(Continued)

return. The corporation withheld a tax of \$248.80 on these wages and you have been given credit for this amount. Your taxable income is increased accordingly.

(b) It has been determined that income from rental properties of \$799.94 was not reported in the return and your taxable income is increased in this amount.

(c) It has been determined that your share of the ordinary income from partnership, Stevens Cleaners & Hatters for 1953 is \$21,888.43
Your return reported a loss from the partnership of 1,617.35

Your taxable income is increased in the sum of \$23,505.78

(d) It has been determined that you had no capital gain through the partnership of Stevens Cleaners & Hatters for 1953 and since your return reported a capital gain of \$10,821.00 from this source, your taxable income is reduced in such amount.

(e) You are entitled to a standard deduction of \$1,000.00 in accordance with section 23(aa) of the Internal Revenue Code and since your return reported a deduction of \$920.37 your taxable income is reduced \$79.63 as above.

Computation of Tax

Net income as adjusted	\$25,588.37
Less: Exemption—4 x \$600.00	2,400.00
<hr/>	
Income subject to tax	\$23,188.37
Income tax liability	\$7,251.12
Income tax liability disclosed by return ..	1,351.28
<hr/>	
Deficiency of income tax	\$5,899.84

Computation of Additional Tax Due

Shown On

	Return	As Corrected
Total income tax liability	\$1,351.28	\$7,251.12
Less: Income tax withheld		\$248.80
Payments on estimated tax	\$375.00	\$375.00
Previous assessments	976.28	1,351.28
<hr/>		<hr/>
Additional tax due	—0—	\$5,651.00

Exhibit "A"—(Continued)

Penalty Computation

Penalty for failure to pay installments on your estimated tax of \$1,500.00 is computed as follows:

Amount due	Installment Due Date	Date Paid	Rate	Penalty
\$ 375.00	3/15/53	3/15/53	—0—	\$—0—
375.00	6/15/53	3/15/54	10%	37.50
375.00	9/15/53	3/15/54	10%	37.50
375.00	1/15/54	3/15/54	6%	22.50
<hr/>				
\$1,500.00	Total penalty under sec. 294(d) (1) (B) I.R.C.			\$97.50
Total tax liability as above				\$7,251.12
Less:				
Withholding tax actually withheld \$248.80				
Estimated tax paid				375.00 623.80
				<hr/>
Balance				\$6,627.32
Penalty under sec. 294(d) (2) I.R.C.				
6% of \$6,627.32				\$397.64

Served and Entered May 23, 1956.

[Endorsed]: T.C.U.S. Filed May 21, 1956.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations set forth in paragraph 1 of the petition.

2. Admits the allegations set forth in paragraph 2 of the petition.

3. Admits the allegations set forth in paragraph 3 of the petition.

4 (a) to (c), inclusive. Denies that the respondent erred as alleged in paragraph 4(a) to (c), inclusive, of the petition.

5 (a). Admits that the amounts reported by the petitioners were received pursuant to an agreement dated April 8, 1947; that the subject property was leased by Sweeney Investment Company to petitioners under a lease agreement dated March 5, 1956; and that petitioners are referred to as the lessors in the agreement of April 8, 1947. Denies the remaining allegations set forth in paragraph 5(a) of the petition.

(b) to (d), inclusive. Denies the allegations set forth in paragraph 5(b) to (d), inclusive, of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the relief sought in the petition be denied, and that the deficiencies in income tax and additions to tax, as set forth in the notice of deficiency, be in all respects approved.

/s/ JOHN POTTS BARNES, JHP,
Chief Counsel, Internal
Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
John H. Pigg, Assistant Regional Counsel,
John D. Picco, Special Attorney, Internal Revenue Service.

Served and Entered July 13, 1956.

[Endorsed]: T.C.U.S. Filed July 11, 1956.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties above named, and acting by and through their respective counsel of record, as follows:

1. The petitioners are Steven and Katherine Voloudakis, husband and wife, residing at 1711 N. Skidmore Street, Portland, Oregon. Petitioners filed joint income tax returns with the then Collector or Director for the District of Oregon for the taxable years 1949 to 1953, inclusive.

2. During the taxable years the petitioners comprised a partnership, d/b/a Stevens Cleaners and Hatters. The principal source of partnership income was derived from amounts received from Pacific Telephone and Telegraph Company. The petitioner Steven Voloudakis also owned 99.6% of the outstanding stock of Stevens Cleaners, Inc., an Oregon corporation engaged in the dry cleaning and used clothing business.

3. Under date of March 5, 1946, petitioners leased a parcel of improved real estate in downtown

Portland situated on Lots 1 to 8, in the south half of Block K, City of Portland, also known as the Sweeny Block, for a term of ten years. The owner of this property was Sweeny Investment Company, of Spokane, Washington, hereafter referred to as Sweeny. A copy of the written lease executed by the parties on March 5, 1946, is attached hereto and made a part hereof as Exhibit 1-A.

4. The petitioners occupied the leased premises, made improvements and operated their dry cleaning business for approximately one year. In the meantime, the Pacific Telephone and Telegraph Company, hereinafter also referred to as Pacific, expressed a desire to occupy the premises. As a result of ensuing negotiations, Sweeny and the petitioners entered into an agreement with Pacific on April 8, 1947. Thereafter, Pacific occupied the premises in accordance with the terms of said agreement. Attached hereto and made a part hereof as Exhibit 2-B is a copy of the agreement dated April 8, 1947.

5. Petitioners reported the amounts received from Pacific, pursuant to the terms of the agreement dated April 8, 1947, on the partnership returns on the theory that the petitioners had sold their lease of March 5, 1946, to Pacific on the installment plan. The partnership returns reflected the following amounts received from Pacific, and the portion thereof included in income as long-term capital gains:

Year	Amount Received	Gains as Computed on Returns	Taken Into Account on Joint Return, 50% as long term Capital Gains
1949	\$21,200.04	\$16,785.21	\$ 8,392.60
1950	27,200.04	21,535.73	10,767.86
1951	27,200.04	21,535.73	10,767.87
1952	27,200.04	21,535.73	10,767.87
1953	27,200.04	21,641.99	10,821.00

6. The Commissioner of Internal Revenue found that the gross amounts reported as received each year from Pacific to be correct, but determined that these amounts represented rental income rather than proceeds of an installment sale of petitioners' leasehold. The Commissioner of Internal Revenue allowed amortization of certain leasehold improvements, and of certain commissions and legal fees, and determined the net rental income each year from Pacific to be as follows:

Year	Gross Rent Received	Allowable Amortization	Net Rent
1949	\$21,200.04	\$5,063.15	\$16,136.89
1950	27,200.04	5,063.15	22,136.89
1951	27,200.04	5,063.15	22,136.89
1952	27,200.04	5,063.15	22,136.89
1953	27,200.04	5,063.15	22,136.89

7. In 1953 the petitioner Steven Voloudakis received \$3,900.00 from Stevens Cleaners, Inc. This amount was entered on the corporate books for 1953 as compensation received by the petitioner for services rendered as president of the corporation and the salary deduction was taken on the corporation's return for that year.

8. The Commissioner of Internal Revenue deter-

mined that the petitioner, Steven Voloudakis, had received salary income in 1953 in the amount of \$3,900.00 from the corporation, Stevens Cleaners, Inc., no part of which was reported on petitioners' income tax return. Therefore, the Commissioner increased the reported net income by \$3,900.00. Petitioners objected to the inclusion of this amount in their income on the ground that the corporation was indebted to Steven Voloudakis in an amount in excess of \$3,900.00 in 1953 and that, therefore, the payments made by the corporation should have been applied to reduce the indebtedness.

9. Attached hereto and made a part hereof as exhibits are the following:

Description	Exhibit
Petitioners' income tax return for 1949	C
Petitioners' income tax return for 1950	D
Petitioners' income tax return for 1951	E
Petitioners' income tax return for 1952	F
Petitioners' income tax return for 1953	G
Partnership return for 1949	H
Partnership return for 1950	I
Partnership return for 1951	J
Partnership return for 1952	K
Partnership return for 1953	L
Corporate return for Stevens Cleaners, Inc. for 1953	M

10. All the exhibits herein mentioned shall be considered as having been offered and received in evidence in this case, unless objection is made thereto and the objection is sustained.

11. Each of the parties hereto reserves the right

to supplement the facts herein set forth with evidence at the trial.

/s/ WILLIAM H. KINSEY,
Counsel for Petitioners.

/s/ HERMAN T. REILING, JHP,
Acting Chief Counsel, Internal Revenue Service,
Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed February 20, 1957.

29 T. C. No. 116

Tax Court of the United States

Steven Voloudakis and Katherine Voloudakis, Petitioners, v. Commissioner of Internal Revenue, Respondent.

Docket No. 62444. Filed March 12, 1958.

Held, amounts received by petitioners during the years in issue from Pacific Telephone & Telegraph Company, pursuant to the terms of a lease agreement executed April 8, 1947, constitute rental income taxable under section 22(a), I.R.C. 1939.

William H. Kinsey, Esq., and James R. Moore, Esq., for the petitioners.

John D. Picco, Esq., for the respondent.

FINDINGS OF FACT AND OPINION

Withey, Judge: The respondent determined deficiencies in the income tax of petitioners and additions to tax under section 291(a) and section 294

(d)(1)(A), (d)(1)(B) and (d)(2) of the Internal Revenue Code of 1939 for the indicated years as follows:

Year	Deficiency	Additions to tax			
		Sec. 291(a)	Sec. 294 (d) (1) (A)	Sec. 294 (d) (1) (B)	Sec. 294 (d) (2)
1949	\$1,868.66	\$ 467.16	\$ —	\$ 4.00	\$145.95
1950	3,241.66	—	387.47	—	258.31
1951	3,635.80	—	—	52.50	261.78
1952	4,093.68	1,023.44	—	75.00	254.63
1953	5,899.84	—	—	97.50	397.64

The issues presented for our decision are the correctness of the respondent's action in determining that (1) amounts received by petitioners from Pacific Telephone & Telegraph Company (hereinafter referred to as Pacific) during the years in issue constituted ordinary income taxable under section 22(a) of the 1939 Code; (2) petitioners are liable for additions to tax under section 291(a) for 1949 and 1952; and (3) petitioners are liable for additions to tax under section 294(d)(1)(A) for 1950, under section 294(d)(1)(B) for 1949, 1951, 1952 and 1953, and under section 294(d)(2) for each of the taxable years in issue.

An additional issue presented by the pleadings was abandoned by petitioners at the hearing.

General Findings of Fact

Some of the facts have been stipulated and are found accordingly.

Petitioners Steven Voloudakis and Katherine Voloudakis are husband and wife and residents of Portland, Oregon. Petitioners filed joint income tax

returns for the years 1949, 1950, 1951, 1952 and 1953 with the director of internal revenue for the district of Oregon.

Issue 1

Findings of Fact

During the years in issue, petitioners, as partners, owned a dry cleaning establishment doing business as Stevens Cleaners and Hatters. In addition, Steven Voloudakis (hereinafter referred to as petitioner or Voloudakis) also owned 99.6 per cent of the outstanding stock of Stevens Cleaners, Inc., an Oregon corporation engaged in the dry cleaning and used clothing business.

Prior to 1946, petitioner conducted his cleaning, dyeing and laundry operations at 1334 S. W. Morrison Street, Portland, Oregon, occupying approximately one-eighth of the premises known as the Sweeny Building or the Sweeny Block.

On March 5, 1946, petitioners executed a lease with the Sweeny Investment Company (hereinafter referred to as Sweeny), owner of the Sweeny Building, for the entire premises comprising the Sweeny Block, subject only to a prior lease to Robert Pantley of a portion of the premises. The lease to Robert Pantley had approximately 6 months to run.

The lease executed by Sweeny and petitioners was for a term of 10 years commencing with the surrender of the premises by all previous tenants except Robert Pantley. The rental provided in the lease was \$1,600 per month, payable on the first day of each calendar month. The lease contained

the standard provisions normally appearing in leases of business property concerning such matters as the maintenance and alteration of the premises, the liability of the lessee for negligence, destruction of the premises, insurance, assignment and subletting, etc. Petitioner occupied the entire premises pursuant to the foregoing lease of March 5, 1946, made certain improvements on the property and operated a cleaning establishment thereon for approximately one year.

Meanwhile, Pacific was attempting to locate available office space in the downtown Portland area, and retained Churchill Cook, a realtor, as its agent for this purpose. Churchill Cook contacted petitioner regarding the need of Pacific for additional space and negotiations for the entire Sweeny Block ensued. On January 17, 1947, Voloudakis signed and sent the following letter to Cook:

Reference is made to our current conversation relative to your procuring for me a sub-tenant who will sub-lease the entire premises known as the Sweeney Block, said premises being further described as the one story building situated on Lots numbered 1 to 8 inclusive in Block South half (S $\frac{1}{2}$) of K in Portland, Oregon, and on which premises I hold a lease expiring in May 1956.

In connection therewith, I agree to vacate and to sub-lease the entire premises in an "as is" condition for the full term of my lease at and for a gross rental at the rate of \$50,000 per year, which rental is to be paid in monthly installments of 1/12th

each month, beginning with the date that the premises are vacated by the undersigned, which will be sixty (60) days from the date of the execution of the lease.

It is further agreed that your prospective tenant at the time of executing said lease will deposit with me the sum of \$35,000.00, which deposit shall represent a partial payment of rent in the amount of \$1500.00 per month for the first 24 months of said lease. While an advance rental at the rate of \$1500.00 per month would equal the sum of \$36,000.00, the \$35,000 so paid represents this amount less \$1000.00 interest deducted therefrom for the usage of same. The balance of the rental due during the first 24 months shall be paid in monthly installments of \$2666.00.

I further agree to vacate 75% of the entire premises within sixty (60) days after the date of the execution of said lease and further agree that the remaining 25% of said premises will be vacated not later than July 30th, 1947.

This agreement shall be valid until February 28th, 1947 in order to permit you and your principals time to accomplish the necessary arrangements to conclude the sub-lease.

This agreement is predicated on the understanding that your principals have viewed the property, have expressed their interest in sub-leasing said premises and that the proposed sub-tenant is a national concern rated at better than One million dollars.

It is further understood and agreed that whereas the undersigned entered into a lease of the above mentioned property in March, 1946, with the Sweeney Investment Company, a corporation, and it is provided in said lease that the same shall not be sub-let or assigned without the written consent of the lessor, Sweeney Investment Company; that this agreement is made contingent upon getting such consent; and if the undersigned is not able to secure said consent, or if the lessor refuses to give its written consent, this entire agreement shall be null and void; and it is further understood and agreed that the parties to whom the undersigned sub-lets or assigns their rights in the lease to this property will, in occupying and using said property, comply with and assume the obligations of the undersigned regarding the occupancy and use of said property, as contained in said lease from the Sweeney Investment Company to undersigned.

The foregoing letter was drafted by Churchill Cook for the purpose of committing petitioners to an offer.

On April 7, 1947, the petitioners signed and sent the following letter to Pacific:

Reference is made to our lease agreement wherein you are leasing the entire one story building situated on Block (S 1½) "K" in Portland, Oregon.

In connection therewith and with specific attention to the advance rental in the amount of \$35,000, to be paid at the time of consummating this lease, please be advised this will authorize and request

you to pay directly to G. C. Cook the sum of \$10,500 from the advance rent to be paid me at that time, said payment to G. C. Cook being payment in full for his services in connection therewith.

This letter was also drafted by Churchill Cook.

Negotiations between the parties culminated on April 8, 1947, with the consent of Sweeny, the original lessor, as required by the lease executed March 5, 1946, and with the execution of a three-way agreement by Sweeny, Pacific and petitioners. The agreement, dated April 8, 1947, was for a term of 9 years (the remainder of the unexpired term under the lease of March 5, 1946) commencing with the surrender of 70 per cent of the premises. The rental to be paid by Pacific was \$50,000 per year, payable monthly at the rate of \$1,900 to Sweeny and \$2,266.67 to Voloudakis. The agreement describes petitioners as lessors and Pacific as lessee, and contains the following provisions:

Whereas, the Lessee desires to lease said premises;

Now, Therefore, for and in consideration of the covenants and agreements of the parties hereto as hereinafter set forth, it is hereby agreed as follows:

1. The Lessors hereby lease to the Lessee all of the property above described for a term of nine (9) years commencing on the date when possession of at least seventy per cent of said premises is delivered to the Lessee, which date shall be not later than May 1, 1947.

* * * * *

22. If the Lessee shall fail to pay any rent or other payments provided for in this lease, or if the Lessee shall default in the performance of any of its covenants in this lease, and if such default is not remedied within thirty (30) days after written notice thereof, Lessors without further notice or demand may enter upon and repossess the premises and expet [sic] the Lessee and those claiming under it and remove its effects without being deemed guilty of trespass and without prejudice to any remedies which may be used for arrears of rent or preceding breach of covenant.

* * * * *

In accordance with the provisions of the foregoing agreement the premises were vacated by petitioner and possession was taken by Pacific. The agreement expired by its terms on or about May 1, 1956.

Pacific negotiated a new lease directly with Sweeny for possession of the premises after May 1, 1956.

The payments made by Pacific to petitioner under the agreement of April 8, 1947, aggregated \$237,130.41. The amounts received by Voloudakis under the agreement of April 8, 1947, were reported by petitioners on their partnership returns as long-term capital gains resulting from an installment sale, with the following explanation of the transaction appended:

On April 8, 1947, taxpayer entered into an agreement with the Pacific Telephone and Telegraph

Company, whereby the company would purchase the taxpayer's interest in the property leased by the taxpayer from Sweeney Investment Co., Spokane, Washington. Taxpayer had previously entered into a lease on March 1, 1946 for a period of ten years with Sweeney Investment Co. for the property which was now made available to the Pacific Telephone and Telegraph Co., for a total price of \$237,130.41 which payments are to be made by that company to the taxpayer from April 8, 1948 to March 6, 1956. This transaction constitutes a sale of the original lease with the profit being reported on the installment plan as less than 30% of the sales price was received during the initial year 1947.

The amounts reported by petitioners as payments received from Pacific during the years in issue were as follows:

Year	Amount Received	Gain as Computed on Returns	Taken Into Account on Joint Return, 50 per cent as long-term capital gains
1949	\$21,200.04	\$16,785.21	\$ 8,392.60
1950	27,200.04	21,535.73	10,767.86
1951	27,200.04	21,535.73	10,767.87
1952	27,200.04	21,535.73	10,767.87
1953	27,200.04	21,641.99	10,821.00

The Commissioner determined that the foregoing amounts represented rental income rather than proceeds of an installment sale of petitioners' leasehold, and allowed amortization of certain leasehold improvements and of commissions and legal fees. The respondent accordingly determined petitioners' net rental income for each of the years in issue to be as follows:

Year	Gross Rent Received	Allowable Amortization	Net Rent
1949	\$21,200.04	\$5,063.15	\$16,136.89
1950	27,200.04	5,063.15	22,136.89
1951	27,200.04	5,063.15	22,136.89
1952	27,200.04	5,063.15	22,136.89
1953	27,200.04	5,063.15	22,136.89

Opinion

The respondent has determined that the agreement executed by petitioners, Sweeny, and Pacific on April 8, 1947, created a sublease between petitioners and Pacific, and that the amounts received by Voloudakis from Pacific during the years in issue constitute rental payments taxable as ordinary income under section 22(a) of the 1939 Code.

Petitioners contend that the transaction resulted in a sale to Pacific of their leasehold interest in the premises known as the Sweeny Block and that the proceeds received pursuant thereto represent long-term capital gain.

In support of their position petitioners rely on our decisions in *Walter H. Sutliff*, 46 B.T.A. 446; *Isadore Golonsky*, 16 T.C. 1450, *affd.* 200 F.2d 72, *certiorari denied* 345 U.S. 939; *Louis W. Ray*, 18 T.C. 438, *affd.* 210 F.2d 390, *certiorari denied* 348 U.S. 829; *McCue Bros. & Drummond, Inc.*, 19 T.C. 667, *affd.* 210 F.2d 752, *certiorari denied* 348 U.S. 829.

In those cases we held that payments received by a lessee in return for the cancellation, surrender or sale by him of his leasehold interest are received for the relinquishment of a capital asset and may be reported as capital gain. In *Walter H. Sutliff*,

supra, the taxpayer as lessee joined with the owner in fee of the premises in a deed conveying the property to a purchaser. We there rejected the contention of the Commissioner that a portion of the consideration received by the taxpayer was a substitute for the rental payments which he might receive throughout the unexpired term of his lease, and held that he had disposed of his leasehold interest in the property and was entitled to report the proceeds as capital gain.

In *Isadore Golonsky, supra*, we held that an amount received by the lessee from the owner of the premises for the accelerated cancellation of a lease constituted capital gain since the tenant's right to the use and possession of the unexpired term was a property right which thereby was transferred by him to the lessor.

Louis W. Ray, supra, involved the relinquishment by the lessee of a restrictive covenant contained in the lease which was preventing the owner from selling the reversion. We held that the transaction constituted a sale of a capital asset under section 117 of the 1939 Code.

In *McCue Bros. & Drummond, Inc., supra*, the taxpayer occupied business premises under a lease which expired during the taxable year in question, but it continued in possession as a statutory tenant under the New York emergency rent control laws. As a statutory tenant the taxpayer had a right to remain in possession of the premises so long as it paid a reasonable rental. Its landlord paid it \$22,500 to vacate and surrender the premises. We

upheld the taxpayer's contention that it had transferred property rights to its landlord in exchange for the \$22,500 received and that the amount realized from the sale represented capital gain.

In each of the foregoing cases the lessee sold, transferred, conveyed or relinquished his leasehold rights for a stated consideration under a written instrument which clearly demonstrated the intention of the parties to effect an absolute transfer or sale of the rights of the lessee in the property. Such an agreement is lacking here. The three-way agreement executed by petitioners, Sweeny, and Pacific is couched throughout in the language of a lease or sublease. Petitioners are consistently referred to as lessors, Pacific is called the lessee, the monthly payments payable by Pacific to Voloudakis are described as rental, and the agreement is termed "this lease." Further, the instrument contains the covenant that "The Lessors hereby lease to the Lessee all of the property above described for a term of nine (9) years." It further provides, consistent with a landlord-tenant relationship, for re-entry of petitioner and reversion of the premises to him in case of Pacific's default.

In addition, the preliminary negotiations between Voloudakis and Pacific indicate that the intention of the parties was to create a lease arrangement rather than a sale. In the letter sent by petitioner to Churchill Cook, he offered "to vacate and to sublease the entire premises in an 'as is' condition for the full term of my lease at and for a gross rental at the rate of \$50,000 per year, which rental is to

be paid in monthly installments of 1/12th each month." In their letter to Pacific, petitioners referred to "our lease agreement wherein you are leasing the entire one story building," and suggested the payment of "advance rental" of \$35,000.

Both the terms of the agreement executed on April 8, 1947, and the negotiations preceding its execution indicate that petitioners and Pacific intended to and did create a relationship of landlord and tenant.

Further, petitioner, in describing his understanding of the purpose and effect of the transaction occurring April 8, 1947, did not state that he intended to sell his interest in the premises. His testimony on this point was indefinite and unresponsive. We are unable to find either from the agreement involved or from the circumstances surrounding its execution, that petitioners sold, transferred or intended to sell or transfer their leasehold interest in the Sweeny Building. As we view the agreement in question, the clear import of the instrument is that the original lease of March 5, 1946, continued in existence for the duration of its term and that petitioners retained a continuing interest in the premises during its existence.

The provisions for the payment to petitioners of the agreed rental present a further point of distinction between the instant case and those on which petitioners rely. The three-way agreement of April 8, 1947, provided for the leasing to Pacific of the Sweeny Building for a term of 9 years at an annual rental of \$50,000, payable \$1,900 per month to

Sweeny and \$2,266.67 per month to petitioners. However, in each of the decisions of this Court cited by petitioners in support of their position, the consideration received by the lessee in exchange for his leasehold interest was in the form of a cash payment, thereby clearly establishing a sales transaction. Since by the nature of the transaction here in issue petitioner received the consideration in equal monthly installments over a 9-year period, it would appear that no reason for the extension of capital gain treatment under section 117(a) and (j) of the 1939 Code exists. Consequently, we are of the opinion that the situation here presented is sharply distinguishable from the facts involved in our decisions in *Walter H. Sutliff*, *Isadore Golonsky*, *Louis W. Ray*, and *McCue Bros. & Drummond, Inc.*, all *supra*.

The petitioners insist that, under the applicable principles of the law of real property prevailing in Oregon, the transaction in question resulted in an assignment of the lease by petitioners to Pacific, rather than a sublease, with the result that petitioners disposed of the remainder of the leasehold term, retained no rights or obligations under the original lease and "stepped out of the picture." However, petitioner points to no Oregon statute or decision, and we find none, which would alter the application of common law principles to the issue presented. At common law, an assigning lessee does not remain liable to his landlord for rent or for the performance of any of the covenants of the lease. *Moline v. Portland Brewing Co.*, 73 Ore. 532, 144 P. 572;

1 Tiffany, *Real Property*, sec. 124 (3d ed. 1939); 32 *Am. Jur.*, *Landlord and Tenant*, secs. 313, 314, 318; 1 *American Law of Property*, p. 310. Under a sublease, however, the lessee does not dispose of his entire term under the lease and remains liable to his landlord for the payment of rent and for the performance of the other covenants of lease, unless specifically released therefrom. See Tiffany, *op. cit. supra*, p. 202. Here, we find nothing in the agreement of April 8, 1947, which either specifically or by implication indicates an intent on the part of Sweeny to release or discharge petitioners from their liabilities as tenants under the original lease.

Since the parties to the agreement in controversy did not eliminate the petitioners and substitute Sweeny in their place, the normal incident of an assignment of lease did not occur. See Tiffany, *op. cit. supra*, p. 197; 1 *American Law of Property*, p. 310. Petitioners also retained under the agreement a right of re-entry and the ousting of Pacific for condition broken. If a complete assignment had resulted from the execution of the foregoing agreement, petitioners would have retained no interest in the premises but instead would have been relegated to their contractual remedies in the event of a breach. The original lease agreement executed by petitioners and Sweeny on March 5, 1946, was not canceled but continued in force, and petitioners remained liable thereunder. We are of the opinion that the transaction consummated on April 8, 1947, was a sublease, rather than an assignment, and we accordingly hold that the amounts received by peti-

tioner from Pacific during the years in issue constitute rental income taxable under section 22(a) of the 1939 Code.

Issue 2

Findings of Fact

Petitioners' returns for 1950, 1951 and 1953 were timely filed, but their returns for 1949 and 1952 were not filed until August 17, 1954. Requests to extend the time for filing the 1949 return until September 15, 1950, were approved by the respondent.

Opinion

Petitioners did not attempt to introduce evidence relating to their failure to file timely returns for 1949 and 1952, and on brief they have not questioned the respondent's determination of additions to tax for failure to file timely returns pursuant to section 291(a) of the 1939 Code. Accordingly, the respondent's determination is sustained.

Issue 3

Opinion

The petitioners object to the determination by the respondent of additions to tax pursuant to section 294(d)(1) of the 1939 Code for failure to file a declaration of estimated tax or pay installments of estimated tax declared, together with the concurrent determination under section 294(d)(2) of the Code of additions to tax for substantial underestimation of estimated tax for each of the years in issue. Petitioners' contention that additions to tax should not be determined under both section 294(d)(1) and section 294(d)(2) for any one year is without

merit. We have held that as a matter of law additions to tax may properly be imposed under both of the foregoing sections of the 1939 Code for the same taxable year. *G. E. Fuller*, 20 T.C. 308, *affd.* 213 F.2d 102; *Harry Hartley*, 23 T.C. 353; *Charles M. Kilborn*, 29 T.C.— (Oct. 24, 1957). The respondent's determinations with respect to additions to tax under section 294(d)(1) and section 294(d)(2) of the Code for each of the years in issue are sustained.

Decision will be entered for the respondent.

Served May 12, 1958.

Tax Court of the United States
Washington

Docket No. 62444

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS, Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed March 12, 1958, it is

Ordered and Decided: That there are deficiencies in the income tax of these petitioners and additions to tax for the taxable years as follows:

Year	Deficiency	Additions to tax, I.R.C. 1939			
		Sec. 291(a)	Sec. 294 (d) (1) (A)	Sec. 294 (d) (1) (B)	Sec. 2 (d) (1)
1949	\$1,868.66	\$ 467.16	\$ —	\$ 4.00	\$145
1950	3,241.66	—	387.47	—	258
1951	3,635.80	—	—	52.50	261
1952	4,093.68	1,023.44	—	75.00	254
1953	5,899.84	—	—	97.50	397

[Seal] /s/ G. G. WITHEY,
Judge.

Entered: March 18, 1958.

Served: March 20, 1958.

United States Court of Appeals
For The Ninth Circuit

Docket No. 62444

STEVEN VOLOUDAKIS, et al., Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

Petitioners, Steven Voloudakis and Katherine Voloudakis, respectfully petition the United States Court of Appeals for the Ninth Circuit to review the adverse decision of the United States entered on the 18th day of March, 1958, determining the deficiency in Petitioners' federal income tax as follows:

		Additions to tax			
		Sec.	Sec. 294	Sec. 294	Sec. 294
ar	Deficiency	291(a)	(d) (1) (A)	(d) (1) (B)	(d) (2)
49	\$1,868.66	\$ 467.16	\$ —	\$ 4.00	\$145.95
50	3,241.66	—	387.47	—	258.31
51	3,635.80	—	—	52.50	261.78
52	4,093.68	1,023.44	—	75.00	254.63
53	5,899.84	—	—	97.50	397.64

I.

Jurisdiction

Petitioners on review are husband and wife, whose residence was and has been continuously since prior to 1947, in Portland, Oregon. Federal income tax returns for the calendar years 1949, 1950, 1951, 1952 and 1953 were filed with the Director of Internal Revenue for the District of Oregon, whose office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The Petitioners filed this petition pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

II.

Nature of Controversy

This controversy involves the proper determination of Petitioners' liability for Federal income tax for the years 1949, 1950, 1951, 1952 and 1953, and particularly whether the receipts from the hereinafter described transaction are properly taxable as ordinary income or properly taxable as capital gain.

On or about March 6, 1946, the Petitioners

leased certain real property situated in the business district of the City of Portland, for a term of years, from Sweeny Investment Co. (Ex. 1-A) and were in actual possession of said premises on the 8th day of April, 1947.

On said April 8, 1947 the Petitioners disposed of their leasehold interest in said real property pursuant to the provisions of a written agreement (Ex. 2-B) which included a down payment of \$35,000.00 and monthly payments of approximately \$2,200.00 throughout the balance of the term of the original lease. This latter document, although denominated a "lease" (and referring to the monthly payments as "rental") nevertheless divested petitioners of their entire interest in the leasehold estate.

Petitioners filed income tax returns for each succeeding year, reporting the transaction fully, and taking capital gains treatment as to the payments received. This procedure was not questioned until February 21, 1956, when a delinquency assessment for the years 1949, 1950, 1951, 1952 and 1953 was levied against petitioners on the grounds that the petitioners' receipts from the transaction were rental and therefore ordinary income and taxable as such.

The basic question presented is whether the transaction of April 8, 1947 was a sale of petitioners' leasehold interest in the property, or whether it was a sub-lease.

Petitioners respectfully submit that the decision of the Tax Court in sustaining the Collector of Internal Revenue was erroneous under the facts of

this case, and request the United States Court of Appeals for the Ninth Circuit to review said decision of the Tax Court of the United States and to reverse the same.

/s/ McDANNELL BROWN,

/s/ WILLIAM H. KINSEY,

/s/ JAMES R. MOORE,

Attorneys for Petitioners.

[Endorsed]: T.C.U.S. Filed June 11, 1958.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 24, inclusive, constitute and are all of the original papers as called for by the "Designation of Contents of Record on Review", including Joint Exhibits 1-A and 2-B, Respondent's Exhibits C thru M, attached to the Stipulation of Facts and Respondent's Exhibits N and O, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United

States, at Washington, in the District of Columbia, this 27th day of June, 1958.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Title of Tax Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Court of Appeals Courtroom, United States Courthouse, Broadway and Main Streets, Portland, Oregon. Wednesday, February 20, 1957.

The above-entitled matter came on for hearing, pursuant to Calendar Call, at 2:00 o'clock, p.m.

Before: The Honorable Graydon G. Withey,

Appearances: William H. Kinsey and James R. Moore, 1001 Board of Trade Building, Portland, Oregon, on behalf of the Petitioner. John D. Picco, on behalf of the Respondent. [1]*

* * * * *

STEVEN VOLOUDAKIS

was called as a witness on behalf of the Petitioner and having [6] been first duly sworn, testified as follows:

The Clerk: State your name and address, Mr. Witness.

The Witness: Steven Voloudakis.

The Clerk: And your address, please?

The Witness: 1711 North Skidmore.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

(Testimony of Steven Voloudakis.)

The Clerk: What city?

The Witness: Portland, Oregon.

Direct Examination

Q. (By Mr. Kinsey): What is your present occupation, Mr. Voloudakis? A. Hat renewing.

Q. At what location do you carry on your business? A. 421 Southwest Washington.

Q. What was your occupation in 1946?

A. Cleaning business.

Q. At what address was that business carried on?

A. That was—I think it was 1334 Southwest Morrison, between 13th and 14th on Morrison.

Mr. Kinsey: I'd like to have the witness presented with Exhibit 1-A, please.

(Document handed to witness by Clerk.)

Q. (By Mr. Kinsey): Exhibit 1-A is a lease between Sweeney Investment Company, dated March 5, 1946, and you and your wife. Does that lease cover the premises that you just referred to, at which you [7] carried on your business?

A. Yes.

Q. In 1946? A. Yes.

Q. Will you explain the circumstances under which that lease was executed?

A. The lease was executed to have cleaning and hat renewing between 13th and 14th on Morrison.

Q. Now, does this lease cover the whole block?

A. The whole block between Morrison and Yamhill.

(Testimony of Steven Voloudakis.)

Q. And bounded on the other sides by?

A. By 13th and 14th.

Q. By 13th and 14th? A. Yes.

Q. That's Southwest? A. Southwest.

Q. In the downtown Portland area?

A. Yes, 14th and Morrison and 13th.

Q. Now, you stated this lease covers the whole block? A. That's right.

Q. Prior to that time, you carried on business at the same location?

A. Yes, only I had about a fourth—one-eighth of the building.

Q. But under this lease, you took over the whole block? [8]

A. The whole block, that's right.

Q. How long did you remain in possession of the whole block under the lease, under Exhibit 1-A?

A. Oh, say about four or six months.

Q. Well, what's the date of that lease now?

Mr. Picco: Actually, your Honor, it's all right for this testimony to go in, but we have stipulated all of those dates, and it would indicate that he was in possession a little longer than that.

Mr. Kinsey: Yes, for a year. This is just a transition question.

Q. (By Mr. Kinsey): It is correct that you were in possession of it approximately a year, is that right?

A. Well, between four and six—perhaps a year, yes.

Q. Now, what were the circumstances surround-

(Testimony of Steven Voloudakis.)

ing your going out of possession, your vacating possession?

A. Well, the telephone company wanted to—they wanted to occupy the place, wanted to—wanted me to go out of there.

Q. Who first contacted you in regard to the telephone company's desires? A. Mr. Cook.

Q. What's his first name?

A. Churchill.

Q. Churchill Cook? [9] A. That's right.

Q. And negotiations ensued as a result of that contact, is that correct? A. That's correct.

Mr. Kinsey: I'd like to now have Exhibit 2-A substituted for—2-B substituted for 1-A in the hands of the witness, please.

(Documents substituted with witness by Clerk.)

Q. (By Mr. Kinsey): Now, Exhibit 2-B is a lease between Sweeney Investment Company, you and your wife, and the Pacific Telephone Company?

A. Yes.

Q. The lease is dated April 8th, 1947. Does that represent the results of the negotiations you just referred to? A. Yes.

Q. With the telephone company?

A. That's right.

Q. Did you vacate the premises pursuant to that lease? A. Yes.

Q. You vacated them completely?

A. Absolutely.

Q. Now, after you vacated the premises, did

(Testimony of Steven Voloudakis.)

you have any further contact with Sweeney Investment Company? A. No. [10]

Q. Did they make any claims against you?

A. No.

Q. Have you made any claims against them?

A. No.

Q. There has just been no contact whatsoever between you and Sweeney Investment Company?

A. No.

Q. Subsequent to the execution of the Exhibit 2-B——

A. I just put my coat on, cleared up the place, and that's the last I've seen of it.

Q. Now, in regard to the telephone company, after you vacated to the telephone company, did you have any contact with the telephone company subsequent to that time? A. Yes, every month.

Q. Now, what happened?

A. By sending me a check.

Q. But outside of your receiving the checks, did you have any contact with the telephone company? A. No.

Q. Did they make any claims against you?

A. Not to my knowledge.

Q. Did you make any claims against them?

A. No.

Q. Now, under the terms of this lease, it expired May 1, 1956. Either prior to such expiration date, or on the expiration [11] date, or thereafter, did Sweeney contact you in connection with anything? A. No.

(Testimony of Steven Voloudakis.)

Q. Did you contact Sweeney Investment Company? A. No.

Q. Did you contact the telephone company?

A. No.

Q. Did the telephone company contact you?

A. No, outside of every month.

Q. Yes, but you never went back into possession? A. No.

Q. Or made any claims—— A. No.

Q. ——of going back into possession?

A. No.

Mr. Kinsey: I have one more question. Mr. Voloudakis hasn't answered it right yet. As I'm going to phrase it, Counsel for Respondent may have an objection to it. If so, he can state it, but I want the record to show that the question was tendered.

Q. (By Mr. Kinsey): By virtue of this second lease agreement, the exhibit you now have in your hand, was it your intent and understanding that you gave up all of your interest in the leased premises in that block covered by the lease agreement? Now, before you [12] answer it——

Mr. Kinsey: Do you object to the question?

Mr. Picco: I'm going to let him answer it.

Q. (By Mr. Kinsey): You may answer the question.

A. I didn't quite get that right.

Q. Was it your intent and understanding that under this lease agreement, the exhibit that you have in your hand, to be that you surrendered all

(Testimony of Steven Voloudakis.)

of your rights—— A. Yes.

Q. ——of the leased premises? A. Yes.

Q. You retained no rights whatsoever?

A. No.

Mr. Kinsey: That's all, your Honor.

The Court: Supposing under the lease, it indicates that he didn't. Which is to govern?

Mr. Kinsey: I don't believe there is any conflict.

The Court: I know, but assume that the lease is different than the oral answer. Which is to govern?

Mr. Kinsey: That's a good question.

The Court: Was that the end of your examination?

Mr. Kinsey: Just one moment. Yes, that's all, your Honor. Your witness.

The Court: Cross examine. [13]

Cross Examination

Q. (By Mr. Picco): Mr. Voloudakis, you said you negotiated this agreement lease with the Pacific T. and T. through Mr. Cook, is that right?

A. Yes.

Q. What did you instruct Mr. Cook to do?

A. Well, I—he come in and in pretty near two or three weeks he wanted me to vacate the place, and he'd pay me so much every month, but I didn't want to offer any prices on it because I didn't know just if the object was to buy it, unless I have all the money in advance.

(Testimony of Steven Voloudakis.)

Q. Did you tell him to find you a purchaser?

A. No.

Q. What did you tell him?

A. I wasn't looking for a purchaser. He was looking for a location.

Q. Did you ask him to find you some tenant?

A. I didn't. He come to me. He asked me if I wanted to vacate the place.

Q. Well, can you describe just a little more exactly what sort of relationship you thought you were getting into?

A. Well, he asked me if I want to vacate the premises, which I have, if it would be so much and if I could get a substantial money on it. So, I told him if I have cash, why then, [14] I could—I might consider it.

Q. Now, you actually thought that you were leasing this thing out to Pacific T. and T., did you not?

A. No.

Q. Did you think you were selling something to Pacific T. and T.?

A. Just vacate my premises.

Q. Actually, as a matter of fact, you intended at all times to lease the property or sublease it to Pacific T. and T. after you found out about the arrangement?

A. I beg your pardon. I didn't quite get that.

Q. As a matter of fact, you intended at all times to lease the property to Pacific T. and T., or sublease to them, to Pacific T. and T.——

A. Well——

(Testimony of Steven Voloudakis.)

Q. —after you found out about Pacific T. and T. wanting the building, is that right?

A. The only thing they asked me, to vacate the premises.

Q. Now, did you tell Mr. Cook on or about January 17, 1947, just about two or three months before this lease was entered into, by letter, didn't you tell him that you were willing to sublease the Sweeney Building for a gross rental at the rate of \$50,000 a year? A. Not to my knowledge.

Mr. Picco: Would you mark this Respondent's Exhibit [15] N for identification?

The Clerk: Exhibit N for identification.

(Respondent's Exhibit N was marked for identification.)

Q. (By Mr. Picco): Now, Mr. Voloudakis, I'm handing you Respondent's Exhibit N for identification, which appears to be a letter dated January 17, 1947, written by yourself, to J. C. Cook, the realtor. Now, I'm going to ask you to look at this and tell me whether that's your signature there at the bottom of that letter? A. Yes.

Q. Now, do you remember that letter at all?

A. I recall these, but I can't recall these.

Q. Does that refresh your memory as to just what you figured you were getting into when you got into this lease with Pacific T. and T.?

A. Just getting so much per month for the period of the lease.

Mr. Picco: Respondent offers Exhibit N, Respondent's Exhibit N for identification in evidence.

(Testimony of Steven Voloudakis.)

Mr. Kinsey: May I inquire what the purpose is of this?

Mr. Picco: Yes. I want to establish here, just in case there is any doubt, that this is a sublease, definitely [16] intended to be a lease with all the incidents of a lease and sublease, namely the rights under a lease.

Mr. Kinsey: Well, then, I object to this because I don't see how that lends itself at all towards such a contention.

The Court: You object to it, I take it, on the grounds of materiality or relevancy?

Mr. Kinsey: Well, this is part of the negotiations culminating in the actual lease. It may be pertinent, but what I'm trying to get is what the connection is in connection with it, and I don't quite relate it up.

Mr. Picco: Your own——

The Court: Just a moment. What's the grounds for your objection?

Mr. Moore: One thing, your Honor, it purports to show what the agreement consists of, for one thing, and it is inconsistent with the actual agreement that was signed. It purports that certain terms existed. Those terms are not true. Those weren't the terms that were carried out.

The Court: I understand your argument, but I'm asking you merely what the grounds for your objection are, the particular grounds for your objection.

(Testimony of Steven Voloudakis.)

Mr. Kinsey: Well, I'll withdraw the objection and let it go in. I don't object to its going in.

The Court: I'll receive the exhibit. [17]

(Respondent's Exhibit N was received in evidence.)

Mr. Kinsey: But the fact——

The Court: You can argue the point you're now arguing better on brief than you can here.

Mr. Kinsey: Yes, except to the extent that it may confuse the witness, because our contention is not that it wasn't referred to as a lease, the term "lease" referred to in it, but, even so, substance prevails, and even this letter says, "In connection therewith, I agree to vacate and sublease the entire premises in and as is condition for the full term of my lease."

There is our contention in a nutshell, and, regardless of what you call it, whether it's sublease or lease, if it's for the full term of the lease, then it's an assignment. The common law says that it amounts to that.

The Court: Mr. Kinsey, you're making your argument now. I've ruled on the exhibit. It's in evidence. Proceed with your cross examination.

Q. (By Mr. Picco): Mr. Voloudakis, do you remember writing a letter dated April 7, 1947, which is the date that this lease instrument is dated, to the Pacific T. and T., which discusses their \$35,000 deposit as mentioned in the lease?

A. I might have, but I can't recall right now.

(Testimony of Steven Voloudakis.)

Mr. Picco: Will you mark this as Respondent's Exhibit O for identification?

The Clerk: Exhibit O for identification.

(Respondent's Exhibit O was marked for identification.)

Q. (By Mr. Picco): I hand you Respondent's Exhibit O for identification, which appears to be a letter dated April 7, 1947, written by you and your wife, to the Pacific Telephone and Telegraph Company, Portland, Oregon. I hand this to you and ask you if that is your signature there?

A. Yes.

Q. And is that the signature of your wife?

A. Yes.

Q. Both you and your wife were—signed the lease agreement of April 8th, 1947? A. Yes.

The Court: I think the agreement will speak for itself.

Mr. Picco: If your Honor please, I'm trying to get across—I thought the intent element possibly entered into the picture, and I want to establish the fact that this rental that's involved here, the \$35,000 deposit, was definitely rental, advance rental, as far as this particular individual is concerned, the man that got into the agreement, and it may [19] be very important at briefing time that I have this on that point.

Mr. Kinsey: We concede that it's referred to as rent, but it was referred to as a lease, and with that concession I don't see how this line of questioning is pertinent.

(Testimony of Steven Voloudakis.)

Mr. Picco: As I understand it, they're conceding, yet they aren't conceding this thing. It looks like a lease, but it isn't a lease.

The Court: You gentlemen——

Mr. Picco: I offer Exhibit O.

The Court: I'm very well aware of each of your contentions and what you have in mind. I suspect I know what's in the exhibit. Let's proceed.

Mr. Picco: I now offer Respondent's Exhibit O for identification.

The Court: Any objection?

Mr. Moore: We have no copy of that.

Mr. Picco: I'm going to make a copy of it for you if you want it.

Mr. Kinsey: May we see it?

Mr. Picco: Yes.

Mr. Kinsey: No objection.

The Court: It may be received.

The Clerk: Exhibit O.

(Respondent's Exhibit O was received in evidence.) [20]

Mr. Picco: That's all.

The Court: Redirect?

Mr. Kinsey: No, your Honor.

The Court: You may step down, Witness.

(Witness excused.)

The Court: Call your next witness.

Mr. Kinsey: Call Churchill Cook.

Whereupon

CHURCHILL COOK

was called as a witness on behalf of the Petitioner and having been first duly sworn, testified as follows:

The Clerk: Please state your name and address.

The Witness: The name is Churchill Cook, 13101 Southeast Rusk Road, Milwaukie.

Direct Examination

Q. (By Mr. Kinsey): What is your occupation? A. I'm a realtor.

Q. Are you licensed with the State?

A. Yes.

Q. Was that also your occupation in 1947?

A. Yes, sir.

Q. When did you first meet Mr. Steven Voloudakis, the gentleman who just preceded you on the stand?

A. Well, in 1947, early in 1947, I walked off the street [21] and introduced myself to him. I had learned through some source or other that he had a lease on the entire premises.

Q. Now, what premises?

A. Southwest 13th and 14th, Morrison and Yamhill, that block, square block. At the time, I was looking for space for the telephone company.

Q. The telephone company had——

A. They had asked me to locate space for them. In fact, they told me their requirements would be five contiguous floors in an office building. They required them for office purposes. I had contacted

(Testimony of Churchill Cook.)

every building of any consequence in town, and there was no such thing available or even close thereto. So, I reported that to them, and they told me it was a situation where they had to have space. As a matter of fact, the urgency for space was that they had—prior to the war, they had ordered their automatic switching equipment, automatic equipment manufactured, and they discontinued the work on it during the war, and, when the war was over, they resumed the work, and they had received notification that the material was on the way. So, they had revenue—what they called their revenue accounting office, that is, the bureau in which all the bills are issued, in that building on Park Street over here, and they required that space for this equipment that was on the way. So, they were very desperately in need of—they wanted 50,000 square feet of office space. Not being available, I looked [22] around at every source I could think of for space, and I had heard some place that Mr. Voloudakis had a lease on that entire block. So, I walked in and introduced myself to him and asked him whether he would consider selling out and getting out.

Q. And those negotiations culminated in the execution of the three-way agreement between Sweeney Investment Company, the Voloudakis, and Pacific Telephone and Telegraph Company, is that correct?

A. That's right.

Q. Now, is it correct that part of the deal was that Mr. Voloudakis had to vacate completely?

(Testimony of Churchill Cook.)

A. Entirely.

Q. And he retained no interest in the premises?

A. He had to get out.

Q. After the telephone company went into possession, what did it do to the premises?

A. Well, they did very extensive remodeling because it virtually was a, oh, a garage type structure, what there was, and they spent a large sum of money to make it into office space.

Q. And they're still in possession?

A. Yes.

Q. They occupy the whole block?

A. That's correct.

Q. No one else occupies the block?

A. No. [23]

Q. Is it true that the nature of the telephone company's occupancy is such that no one else can occupy any of it except the telephone company?

A. That's correct.

Q. Now, that lease, that three-way one, that Exhibit 2-B, expired on May 1, 1946, I understand, or '56.

A. About then.

Q. Is it your knowledge that the telephone company negotiated a new lease?

A. I've been told they did.

Q. In any event, they're still in possession of the premises?

A. Yes.

Q. I'll hand you Exhibit N and ask you to review it. Did you draft that exhibit?

A. Yes, I did, and whether it was—I drafted it, yes.

(Testimony of Churchill Cook.)

Q. I'll hand you that exhibit.

The Court: Which one are you handing him?

Mr. Kinsey: That's O.

The Witness: Yes, sir, I drafted this too.

Mr. Kinsey: That's all, your Honor.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Picco): Just tell us under what circumstances you drafted [24] Exhibits N and O.

A. Well, the first one was sort of a summation of all the conversations on the thing that we had. In other words, to put this deal together, you understand that Mr. Voloudakis did not know of whom I was talking at all, in fact, or who wanted the space. I simply told him that I had a concern that was worth a million dollars or more, who would want the space. In other words, I had to put something together to get him to agree to something.

Q. He knew he was dealing with an outfit that had a million dollars or more, did he not?

A. That's right, that's correct.

Q. Why did you—this Exhibit N then, as far as you could see it, is exactly what the parties had in mind at the time, is that it?

A. Well, it was putting together the facts of the situation, sort of put them on a negotiation basis.

Q. You know exactly what Exhibit N shows? It talks in terms of subleasing and leasing and rentals?

A. Yes.

Q. Now, when you made a statement earlier in

(Testimony of Churchill Cook.)

your testimony that you went in and asked him whether he would consider selling out, in view of this Exhibit N, and now that your memory is probably refreshed because you've looked it over, wasn't it more likely you went in and asked him whether he [25] wanted to lease or sublease——

A. No, I don't think so.

Q. ——to someone that you were representing?

A. No, I don't think so. In other words—you understand he had a lot of equipment and one thing or another, and one of the first things he told me, when I went in there, he didn't think he'd be interested. He said he had just spent some \$80,000 or something in new equipment, and he didn't think he'd be interested.

Q. Well, this may be repeating, but, as far as you know, this Exhibit N represented the thoughts of the parties at the time?

A. Well, it's the terminology that I used there.

Q. And that really culminated in this Exhibit 2-B, which you seem to know about?

A. 2-B. Which is that?

Q. That's the lease in question. That's correct, is that right? A. Yes.

Q. Now, another question was asked of you, whether Mr. Voloudakis retained any interest in the premises, and you said, "No". Now, you were referring, were you not, by that, that he gave up possession of the property? A. That's correct.

Mr. Picco: That's all, your Honor. [26]

The Court: Any redirect?

(Testimony of Churchill Cook.)

Mr. Kinsey: That's all, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Kinsey: Petitioners rest.

The Court: Before you rest, I'd like to recall Mr. Voloudakis. Will you come up here, Mr. Voloudakis?

Whereupon

STEVEN VOLOUDAKIS

having been previously sworn, resumed the stand.

Examination by the Court

The Court: Mr. Voloudakis, you're not a lawyer, I take it?

The Witness: No, I'm not.

The Court: Will you tell me what your idea of a lease is?

The Witness: I have made one, your Honor, but I don't know from one end to the other.

The Court: Well, what do you think a lease is?

The Witness: Well, just more or less you rent a place and you want to be sure you stay five years or ten years, or if you just—it makes you secure that you've got that much time to occupy the premises.

The Court: Now, when you were in these premises, you leased a whole block, as I understand it?

The Witness: Yes, your Honor.

The Court: But you didn't occupy the whole block yourself, did you?

The Witness: Not at that time, no, I didn't.

(Testimony of Steven Voloudakis.)

The Court: And you subleased part of the block to other people, did you?

The Witness: No, your Honor. It was occupied by other firms until their time was up. They had about a six months lease.

The Court: I see.

The Witness: But I was paying the rent for the full block.

The Court: Now, when you went into this block under the lease, you understood that you were going to have to pay rent for the whole block?

The Witness: That's right.

The Court: And did you understand that you had a contract with the owner that required you to pay that rent?

The Witness: That's right.

The Court: All right, and did you understand that you had a contract with that owner that required you to pay that rent over a fixed period of time?

The Witness: Yes.

The Court: How long was that?

The Witness: I believe that was for six or seven [28] years I was there for the — before this last lease.

The Court: But how long did the lease have to go yet?

The Witness: Oh, it had about nine years to go.

The Court: And you knew that the owner could say to you, "You pay me the rent for nine years"?

The Witness: That's right.

(Testimony of Steven Voloudakis.)

The Court: You realized that?

The Witness: That's right.

The Court: Now, what did you think was going to happen to that contract, that lease, when you left the premises?

The Witness: Well, I couldn't sign the lease, your Honor, unless the landlord consented. I couldn't go out—I can't vacate the place unless the landlord stopped the lease or something, or rent it or vacate it, unless I—I couldn't even sell it if I wanted to sell it unless I have the landlord's consent.

The Court: And did the landlord give you his consent?

The Witness: That's right. I couldn't make the change otherwise.

The Court: How did he give you the consent?

The Witness: They had this Norris & Beggs as their agent.

The Court: Is it agreeable between Counsel here that there is a consent by this landlord?

Mr. Kinsey: Your Honor, Exhibit 2-B is a three-way [29] agreement. One of the three parties is the original lessor. So, by virtue of their being a party, they consented of necessity to the whole thing.

The Court: All right. You may step down, unless there are some further questions.

Mr. Picco: Nothing further.

(Witness excused.)

The Court: Do you have some testimony?

Mr. Picco: No, I have not, your Honor.

The Court: I take it you rest?

Mr. Picco: That's right.

The Court: Sixty days for simultaneous briefs, 30 days for reply. State the dates, please.

The Clerk: Original briefs will be due on or before April 22nd and reply briefs on or before May 22nd, 1957.

The Court: All right, that concludes this case.

(Whereupon, at 2:40 o'clock p.m., the hearing in the above-entitled matter was closed.) [30]

[Endorsed]: T.C.U.S. Filed March 4, 1957.

[Endorsed]: No. 16092. United States Court of Appeals for the Ninth Circuit. Steven Voloudakis and Katherine Voloudakis, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: July 16, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

STIPULATION WITH RESPECT
TO PRINTING EXHIBITS

Whereas, there are a number of documentary exhibits which would be expensive to print, but which each party on brief and in argument will wish to refer to;

It Is Hereby Stipulated by and between the parties, through their attorneys of record, subject to the approval of the Court, that all of the documentary exhibits may be considered by this Court in their original form, and need not be printed in the record.

The Exhibits to which this Stipulation refers are numbers 1-A and 2-B (joint exhibits) and Respondent's exhibits 3-C through M (all of the foregoing being included in the Stipulation of Facts) and Respondent's exhibits N and O, admitted upon the hearing. These include all of the exhibits introduced at the trial of this cause.

Dated July 25th, 1958.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Attorney for Respondent.
/s/ McDANNELL BROWN,
Attorney for Petitioners.

[Endorsed]: Filed July 26, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED

To: Hon. Paul P. O'Brien, Clerk of United States
Court of Appeals for the Ninth Circuit:

Appellants designate the following documents to
be included in the printed Transcript of Record in
this proceeding:

- (1) Petition
- (2) Answer
- (3) Stipulation of Facts, omitting the exhibits
- (4) Transcript of the proceedings before the Tax
Court, omitting opening statements of counsel
- (5) Findings of Fact and Opinion
- (6) Decision
- (7) Certificate of Clerk to transcript of record
- (8) Stipulation with respect to printing exhibits
- (9) Statement of Points Relied Upon.

Dated this 25th day of July, 1958.

/s/ McDANNELL BROWN,
Attorney for Appellants.

[Endorsed]: Filed July 26, 1958. Paul P.
O'Brien, Clerk.

